No. 87-961

In the Supreme Court of the United States

OCTOBER TERM, 1987

JOHN BEGAY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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TABLE OF AUTHORITIES

Cases:	Page
Bacon v. *United States*, 810 F.2d 827 (8th Cir. 1987)	4
Barnson v. *United States*, 816 F.2d 549 (10th Cir.1987), cert. denied, No. 87-104 (Oct. 13, 1987)	4
Berkovitz v. *United States*, cert. granted, No. 87-498 (Jan. 11, 1988)	5
Merklin v. *United States*, 788 F.2d 172 (3d Cir. 1986)	4
United States v. *S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797 (1984)	2, 4

Statute:	
Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*	1
28 U.S.C. 2680(a)	1, 2, 5

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Petitioners seek review of a decision by the court of appeals that their claims were barred by the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. 2680(a). Petitioners contend that the federal government's trust responsibilities towards Indians preclude application of the discretionary function exception to claims by Navajo uranium miners that the government negligently failed to protect them from, or warn them against, the possible dangers of radiation exposure.

1. Petitioners are former Navajo uranium miners (or their survivors) who worked in privately owned and operated mines on the Navajo Reservation in the 1940s and 1950s. Petitioners brought suit against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*, contending that the government negligently failed to establish and enforce radiation safety standards in the underground mines where the miners worked. Petitioners further contended that the United

States Public Health Service, which conducted an epidemiological study in the 1950s of the health hazards associated with uranium mining, negligently failed to warn them of the possible dangers of radiation exposure.

On petitioners' own motion, the district court severed the claims of eleven "representative" plaintiffs for trial. After full discovery on issues common to all plaintiffs (as well as on "causation" issues particular to the "representative" plaintiffs), the case was tried to the district court. After trial, the district court entered detailed findings of fact and conclusions of law (Pet. App. A1-A43) and held that the claims of the "representative" plaintiffs were barred by the discretionary function exception to the FTCA, 28 U.S.C. 2680(a).[1]

The "representative" plaintiffs sought review of that decision before the United States Court of Appeals for the Ninth Circuit which, on August 13, 1985, affirmed the district court's decision (Pet. App. B1-B14). The court of appeals determined in *Begay I* (*id.* at B10-B13) that both the alleged failure to regulate and the failure to warn were discretionary decisions falling within the discretionary function exception to the FTCA, as interpreted by this Court in *United States* v. *S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 813 (1984). The "representative" plaintiffs did not seek certiorari.

2. Petitioners—those who were not named as representative plaintiffs in the initial test cases—subsequently

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[1] Section 2680(a) precludes the exercise of jurisdiction by the federal courts over:

> Any claim * * * based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

sought to amend their complaint in the district court.[2] The government opposed that motion, and the district court, treating the government's opposition as a motion for summary judgment, entered judgment for the government (Pet. App. D1-D3). In an oral opinion, the district court noted (*id.* at C3) that in the Amended Complaint "there is nothing that I can find that is a new fact in the sense that it would materially change or change at all the outcome of the original trial." The court therefore concluded (*id.* at C4) that petitioners' claims were barred by the discretionary function exception "for the same reasons as stated in the findings of fact and conclusions of law that resulted from the first trial in 1983 of the representative plaintiffs and as affirmed in the opinion of [the court of appeals in *Begay I.*]"[3]

The court of appeals affirmed in an unpublished opinion (Pet. App. E1-E3). The court stated (*id.* at E3): "[T]his action and *Begay I* are not factually distinguishable. Thus, the doctrine of *stare decisis* applies to [petitioners'] action, and the discretionary function exception of the FTCA bars their claims."

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[2] Petitioners sought to add to their complaint, in addition to a realleged "failure to warn" count, claims of: (1) breach of an alleged "good samaritan" undertaking; (2) medical malpractice; (3) professional and industrial health malpractice; and (4) breach of alleged duties to research subjects.

[3] The district court also stated (Pet. App. C3-C4) that "under the principle of virtual representation" the case was "subject to dismissal on *res judicata* or collateral estoppel grounds." The court noted that petitioners and the representative plaintiffs had "the same attorneys * * *, the same issues involved, the same facts involved" and that the representative plaintiffs had been specifically "selected by the plaintiffs as being representative of everybody else in the group" (*id.* at C4). The district court decided (*ibid.*), however, that it was "safer, in order to enable counsel for the [petitioners] to have a better record to appeal on," to grant summary judgment for respondents on the merits.

3. The court of appeals was clearly correct in concluding that petitioners' claims were barred by a straightforward application of the discretionary function exception to the FTCA. Petitioners' assertion that they are entitled to a special exemption from the discretionary function exemption is without merit.

a. Although petitioners claim (Pet. 9) that there are "dramatic disparities" between the facts in *Varig Airlines* and the instant case, this case is clearly controlled by *Varig Airlines*. Decisions by government agencies as to whether regulation is necessary in a given area or whether warnings should be issued as to certain health hazards are quintessentially discretionary. As this Court clearly stated (467 U.S. at 813-814), "whatever else the discretionary function exception may include, it plainly was intended to encompass the discretionary acts of the Government acting in its role as a regulator of the conduct of private individuals." Other courts of appeals faced with identical or analogous allegations have also concluded that they were barred by the discretionary function exception. See *Barnson* v. *United States*, 816 F.2d 549, 553-555 (10th Cir. 1987) (alleged failure of U.S. Public Health Service and AEC to warn uranium miners of, and protect them against, radiation hazards), cert. denied, No. 87-104 (Oct. 13, 1987); *Bacon* v. *United States*, 810 F.2d 827 (8th Cir. 1987) (alleged failure of HUD and EPA to warn of dioxin levels during repair of roads at Times Beach under federal block grant); *Merklin* v. *United States*, 788 F.2d 172 (3d Cir. 1986) (AEC inspectors' alleged failure to warn uranium processing plant employees of health hazards discovered during AEC inspections).[4]

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[4] There are no allegations in this case that any government agency negligently failed to follow its own regulations in regulating the safety of a given agency. Rather, the claim is that the agency failed to pro-

b. Petitioners' contention that the federal government's special "trust responsibility" for the Indian tribes should preclude application of the discretionary function exception to Navajo Indian miners finds no support in law or logic. Such a trust responsibility might affect the duty of care owed to petitioners and, thus, aid their attempts to establish negligence. But whether or not the United States was negligent has no bearing on the proper interpretation of the discretionary function exception, which applies "whether or not the discretion involved be abused." 28 U.S.C. 2680(a). Petitioners are unable to point to a single case that holds, or any authority that even implies, that the discretionary function exception should be construed more narrowly when applied to Indian plaintiffs.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General

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mulgate suitable regulations or to issue appropriate warnings. Thus, this case does not present any issue found in *Berkovitz* v. *United States*, cert. granted, No. 87-498 (Jan. 11, 1988), and there is no reason to hold this case for disposition in light of *Berkovitz*.

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